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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-72

PEERLESS PRESSED METAL CORPORATION,
Petitioner,

v.

INTERNATIONAL UNION OF ELECTRICAL, RADIO & MACHINE WORKERS, AFL-CIO, IN BEHALF OF ITSELF AND ITS LOCAL 209,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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INTERNATIONAL UNION OF ELECTRICAL, RADIO & MACHINE WORKERS, AFL-CIO, IN BEHALF OF ITSELF AND ITS LOCAL 209,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Petitioner, Peerless Pressed Metal Corporation, prays that a Writ of Certiorari issue to review the final Judgment of the United States Court of Appeals for the First Circuit entered on April 9, 1973

I. OPINIONS BELOW

The Court of Appeals decision is not yet officially reported, but may be found at 82 LRRM 3089. The District Court decision is unreported. Copies of these decisions as well as a copy of the Arbitrator's award and "clarification statement" appear herein as Appendices A, B, and C, respectively.

II. JURISDICTION

The Judgment of the Court of Appeals was entered on April 9, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1) (1964).

III. QUESTIONS PRESENTED

1. What is the appropriate standard to be applied by the Federal Courts in reviewing labor arbitration awards?
2. Does a judicial determination that a matter is arbitrable preclude a subsequent judicial determination that the arbitrator has exceeded his authority?
3. In the absence of a specific statutory provision for assessment of attorney's fees, may a party who prevails in District Court be charged with the losing party's attorney's fees when the District Court decision is reversed?

IV. STATUTES INVOLVED

The relevant provisions of the Labor Management Relations Act, 1947, as amended, 29 U.S.C. 151 et seq. and of the United States Arbitration Act, 1925, as amended, 9 U.S.C. 1 et seq. are set forth in Appendix D.

V. STATEMENT OF THE CASE

The Petitioner is a privately owned company (hereinafter referred to as the "Company") located in Watertown, Massachusetts engaged in the manufacture of quality precision metal products. The production and maintenance employees are represented by the International Union Electrical Workers, Local 209, AFL-CIO (hereinafter called the "Union").

On October 30, 1965, William F. Burke, a member of the bargaining unit, was promoted to the position of foreman of the Spot Welding and Assembly Department. Because of a decline in the need for supervision due to business conditions, Burke was laid off on September 11, 1970. At the time of his layoff, Burke asked that he be re-employed in the bargaining unit based upon the seniority he had acquired prior to his promotion to foreman. The Company declined to do so. Notwithstanding there was no provision for such return in the existing collective bargaining agreement, the Union attempted to raise the matter by filing a grievance on Burke's behalf.

The grievance was not resolved by the parties, and the Union then attempted to invoke the arbitration provisions of the collective bargaining agreement. The Company, claiming the dispute was not arbitrable, sought to resist the arbitration in the United States District Court for the District of Massachusetts. The District Court ordered arbitration, *Peerless Pressed Metal Corp.* v. *International Union of Electrical, Radio & Machine Workers*, in an unreported decision. The Company appealed and the First Circuit affirmed, *Peerless Pressed Metal Corp.* v. *IUE*, 451 F.2d 19, 78 LRRM 2828 (1971), applying the "all doubts" rule of *Steelworkers* v. *Gulf & Warrior Navigation Co.*, 363 U.S. 574, 46 LRRM 2416 (1960) holding *inter alia:*

> "A dispute may not be kept from the arbitrator on this ground so long as it is "possible", even if as a court we might not think it "reasonable", for an arbitrator to decide in favor of the party demanding arbitration without thereby, in effect, amending the plain language of the agreement." Supra at 451 F.2d 20, 78 LRRM 2828.

Thereafter the matter was submitted to arbitration and on December 10, 1971, the Arbitrator issued his

opinion and award.[1] Expressly conceding "the contract was silent" as to any provision covering this dispute, he drew upon alien sources outside the contract by relying upon a line of reported arbitral precedents, that has always "assumed" employees promoted to supervision retained vested rights to return to a bargaining unit and that therefore Burke was entitled to reinstatement.

On December 23, 1971, the Union requested that the Arbitrator clarify his award in that it made no reference to the matter of compensation for Burke. The Company objected to the Union's request, but the Arbitrator nevertheless issued a "clarification statement" on January 20, 1973, stating that Burke was entitled to compensation from the date of the Company's refusal to reinstate him into the bargaining unit.

The Union thereupon filed a complaint in United States District Court for the District of Massachusetts seeking in essence to confirm the award and clarification statement. The Company responded with a counterclaim seeking to vacate the award and clarification statement.

On cross motions for summary judgment, the District Court, after a thorough analysis, found that ". . . the Arbitrator exceeded his authority in making the award in that it failed "to draw its essence from the collective bargaining agreement."[2] *I.U.E.* v. *Peerless Pressed Metal Corp.* (unreported). The Court also held that in view of its vacation of the award itself, it was unnecessary

[1] The award includes rulings on a number of issues both procedural and substantive, other than the merits, which are not raised in this petition for certiorari. The petitioner's basic thrust herein is that the arbitrator's award is invalid because it exceeded the scope of his authority and should not have been upheld by the Circuit Court below.

[2] Article XVII of the labor contract expressly denied the arbitrator authority to "add to, detract from, or in any way alter the provisions of this agreement." (See Appendix C p. A-18 of this petition.)

to reach the question of the validity of the "clarification statement".[3]

On appeal to the Court of Appeals for the First Circuit, the District Court decision was reversed with an additional award of attorney's fees to the Union. *I.U.E.* v. *Peerless Pressed Metal Corp.*, —— F.2d ——, 82 LRRM 3089 (April 9, 1973). In a short *per curiam* decision, the Court of Appeals relied almost exclusively on its previous holding that the dispute was arbitrable and therefore, *a fortori*, the Arbitrator could not possibly have exceeded his authority. Under this rationale, the Court thus, in effect, precluded a subsequent judicial determination that the Arbitrator had exceeded his authority as required under *Steelworkers* v. *Enterprise Car & Wheel Corp.*, 363 U.S. 593, 46 LRRM 2423 (1960).

Even though the Company had prevailed in the District Court, the Court of Appeals awarded the Union attorney's fees for the District Court proceeding based upon "the intransigence of (the Company) in resisting enforcement of the arbitration award . . ." For the reasons set forth hereinafter the Company seeks review of the Court of Appeals action.

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[3] The complete text of the District Court's opinion appears in Appendix B to this petition.

REASONS FOR GRANTING THE WRIT

1. IN THE THIRTEEN YEARS SINCE THIS COURT FIRST ATTEMPTED TO DELINEATE THE APPROPRIATE STANDARD FOR REVIEW OF ARBITRATION AWARDS IN *STEELWORKERS* v. *ENTERPRISE WHEEL & CAR CORP.*, 363 U.S. 593, 46 LRRM 2493 (1960), CONSIDERABLE CONFUSION AND CONFLICT HAS DEVELOPED AMONG THE CIRCUITS.

In the landmark decision *Textile Workers* v. *Lincoln Mills*, 353 U.S. 448, 40 LRRM 2113 (1957), this Court held that Sec. 301(a) of the Labor Management Relaitons Act [4] authorized the federal judiciary to fashion a uniform body of substantive law to be applied in suits dealing with collective bargaining agreements.

Some three years later in the now so-called "Steelworkers Trilogy" [5] the Court sought to flesh out a portion of the substantive law by attempting a basic delineation of arbitral authority.

Of the three cases encompassing the "trilogy", it is *Enterprise* which dealt specifically with judicial review of arbitration awards; and it is *Enterprise* which has engendered the most comment, criticism and confusion. Speaking for the Court in *Enterprise*, Mr. Justice Douglas first stated:

> "The refusal of courts to review the merits of an arbitration award is the proper approach to arbitration under collective bargaining agreements. The federal policy of settling labor disputes by arbitra-

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[4] 29 U.S.C. § 185(a).

[5] *Steelworkers* v. *American Mfg. Co.*, 363 U.S. 564, 46 LRRM 2414 (1960); *Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 46 LRRM 2416 (1960); *Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593, 46 LRRM 2423 (1960).

> tion would be undermined if courts had the final say on the merits of the awards."

He went on to say, however;

> "Nevertheless, an arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may, of course, look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award." 363 U.S. at 597, 46 LRRM 2425.

Thus, under *Enterprise*, courts are not to review the merits of arbitration awards, but are to refuse to enforce such awards if the arbitrator exceeds the authority given to him under the contract.

In the thirteen years since *Enterprise*, attempts to apply the above teachings have resulted in a myriad of opinions with the Circuit Courts variously applying the following standards:

> —an award should not be vacated so long as the interpretation was not arbitrary. *Local 7-644 Oil, Chemical & Atomic Workers* v. *Mobil Oil Co.*, 350 F. 2d 708, 59 LRRM 2938 (CA 7 1965)

> —an award should be vacated when it is contrary to the terms of the collective bargaining contract. *Amanda Bent Bolt Co.* v. *U.A.W.*, 451 F. 2d 1277, 79 LRRM 2023 (CA 6 1971)

> —an award should be vacated when there is no ground upon which to base his interpretations. *H. K. Porter Co.* v. *United Saw, File and Steel Products Workers*, 333 F. 2d 596, 56 LRRM 2534 (CA 3 1964)

> —an award should not be vacated unless the reasoning is so palpably faulty that no judge, or group of judges, could ever conceivably have made such a ruling. *Safeway Stores* v. *Bakery Workers, Local 111*, 390 F. 2d 79, 67 LRRM 2646 (CA 5 1968)

The variety of approaches to the *Enterprise* test can be clearly illustrated by a comparison of the Second Circuit's decision in *Torrington Co.* v. *Metal Products Workers*, 362 F. 2d 677, 62 LRRM 2495 (1966) with the Ninth Circuit's decision in *Holly Sugar Corp.* v. *Distillery Workers*, 412 F. 2d 899, 71 LRRM 2841 (1969).

In *Torrington*, the Union had sought unsuccessfully in negotiations to have a paid voting time provision included in the contract. In *Holly*, the Union had sought unsuccessfully in negotiations to have a general painter classification included in the contract. In both cases, the arbitrators found the companies obligated to do that which they had successfully resisted including in the contract. Yet, in *Torrington*, the award was vacated and in *Holly* the award was enforced.

The confusion existant under *Enterprise* is perhaps best summarized by the Third Circuit which has figuratively thrown up its hands in frustration at the task of attempting to harmonize the various decisions in this area.

> ". . . one problem has emanated from the cases which have followed *Enterprise*: that of formulating a consistent and workable standard to be utilized by the courts in exercising the function of review. Circuit and District Courts have not exuded uniformity . . . *Each case seems to have fashioned its own standard* . . ." *Honold Mfg. Co.* v. *Fletcher*, 405 F. 2d 1123, 1126; 70 LRRM 2368, 2369 (1969) (Emphasis supplied)

It is thus clear that the inherent conflict in *Enterprise* has spawned a situation of confusion which has frustrated

the original objective of *Lincoln Mills*; to fashion a consistent body of federal substantive labor law.[6]

Petitioner submits that the time is ripe for this Court to review and clarify *Enterprise*.

2. THE RATIONALE USED BY THE COURT OF APPEALS BELOW IS CONTRARY TO THE TEACHINGS OF THIS COURT IN THE "STEELWORKER TRILOGY" AND CONFLICTS WITH THE APPROACH OF OTHER CIRCUITS.

Despite the considerable confusion engendered by *Enterprise*, one point has emerged with relative clarity; the standards for post award judicial review (vague though they may be) are different from the standards for the preliminary determination of arbitrability.

It is clear that the preliminary question of arbitrability is a separate and distinct issue from the subsequent question of review of an arbitrator's award.

In *Warrior & Gulf*, the Court dealt with the first issue and indicated in no uncertain terms that the judicial role was severely circumscribed. The Court made plain that all doubts were to be resolved in favor of arbitration:

> "An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage." *Supra* at 363 U.S. 582-3, 46 LRRM 2419-20.

In *Enterprise*, however, the Court considered post award judicial review, and, despite the extravagant rhetoric, recognized the possibility of arbitral excesses:

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[6] Another significant illustration of the confusion on this subject is the unresolved conflict over the applicability of the U. S. Arbitration Act, 9 U.S.C. § 1 et seq. Compare, for example, *Honold* with *Amanda Bent Bolt*.

> "When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award." Supra.

In the thirteen years since the trilogy, several circuit courts have stated explicitly that arbitrability and post award review are two separate issues and a holding of arbitrability does not insulate the subsequent award from judicial review. On this point, the Fifth Circuit has stated:

> ". . . there may be in these controversies two distinct problems. One is whether the grievance is arbitrable. The other is whether the award of the arbiter is to be enforced. *To order arbitration is not to approve in advance all, or for that matter, any thing that the arbiter does.* Especially where unusual difficulties are indicated courts expressly defer problems of enforcement to post award proceedings." (Emphasis supplied) *Safeway Stores* v. *Bakery Workers, Local 111*, 390 F. 2d 79, 81; 67 LRRM 2646, 2647 (1968).

The Ninth Circuit in *Holly Sugar Corp.*, supra, has interpreted this Court's teachings in exactly the same way:

> "Moreover, Holly is quite correct in its argument that simply because a court would compel arbitration in a particular dispute does not necessarily mean that it would approve of everything or anything which the arbitrator might decide in resolving the dispute." Supra, 412 F. 2d 902, 71 LRRM 2843.

The Second Circuit is not only in accord with the foregoing but has succintly stated the rationale, that "No great harm is done by applying a liberal rule as to arbitrability, if the court carefully scrutinizes what the arbitrator later decides." [7] *Torrington Co.* v. *Metal Products Wrokers*, supra 362 F. 2d 680 fn.4, 62 LRRM 2497 (1966).

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[7] Citing Hays, *Labor Arbitration, A Dissenting View*, p. 80 (1966).

In the present case, however, the Circuit Court utilized a "bootstrap" argument which has been rejected by other circuits. The Court in a brief *per curiam* decision reversed District Judge Murray's carefully reasoned opinion on the basis that having held the dispute arbitrable, an award in favor of the union was insulated from judicial review.

> "In *Peerless Pressed Metal Corp.* v. *I.U.E.*, 1 Cir., 1971, we must necessarily have ruled, by requiring arbitration of the issue between the parties, that a decision in favor of the union would not violate the collective bargaining contract on its face. The district court's refusal to enforce the award in its favor, from which refusal the union now appeals, was based on a contrary view of the proper construction of the contract. In the light of *Peerless*, this was no longer a permissable conclusion." [8] *I.U.E.* v. *Peerless Pressed Metal Corp.* (Appendix A herein)

The Court has thus, in one fell swoop, rendered *Enterprise* meaningless and made arbitrability and post award review synonymous. Such a conclusion is clearly in conflict both with this Court and with other circuits.

3. THE AWARD OF ATTORNEY'S FEES BY THE COURT OF APPEALS IS IN DIRECT CONFLICT WITH THIS COURT'S RECENT DECISION IN *HALL* v. *COLE*, —— U.S. —— (NO. 72-630), 83 LRRM 2177 (MAY 21, 1973).

This Court has, on several occasions dealt with the question of attorney's fees as recoverable costs. In *Fleischmann Distilling Corp.* v. *Maier Brewing Co.*, 386 U.S. 714 (1967), the Court stated the general rule that counsel fees are ordinarily not recoverable:

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[8] Interestingly enough, a reading of the Court's opinion holding the dispute arbitrable shows that they did so with considerable reluctance, and in fact characterized the union's position as "weak". Supra 451 F.2d 21.

> "The rule here has long been that attorney's fees are not ordinarily recoverable in the absence of a statute or enforceable contract providing therefor." 386 U.S. 717.

In *Hall* v. *Cole*, Mr. Justice Brennan, speaking for the Court, exhaustively reviewed the entire subject of attorney's fees as recoverable costs. While reaffirming the traditional American rule disfavoring the allowance of attorney's fees, the Court noted two exceptions within the inherent equitable powers of the federal courts.

Thus, Mr. Justice Brennan indicated that a federal court may award counsel fees; (1) when the unsuccessful litigant has acted "in bad faith, vexatiously, wantonly, or for oppressive reasons", or (2) where the plaintiff's successful litigation "confers a substantial benefit on the members of an ascertainable class, and where the court's jurisdiction over the subject matter of the suit makes possible an award that will operate to spread the costs proportionately among them." Supra —— U.S. ——, 83 LRRM 2178-9.

Clearly, the Circuit Court's award of attorney's fees must be evaluated solely in accordance with the first exception, which this Court has characterized as "punitive".[9] Speaking of this punitive basis for fee shifting, this Court stated in *Hall* v. *Cole*:

> ". . . the essential element in triggering the award of fees is therefore the existence of 'bad faith' on the part of the unsuccessful litigant." 83 LRRM 2178-9.

Yet, here there has been no finding of "bad faith" on the part of the Company and no evidence to support such a finding. In fact, in the District Court proceeding, for

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[9] There is obviously nothing in this case which would bring into play the "common benefit" theory, and this was not the basis of the court's award.

which the union was awarded counsel fees, the Company was the *successful* litigant.

The Court of Appeals based the award on the Company's "intransigence" in resisting the arbitrator's award in light of its own earlier decision holding the dispute arbitrable. As has been previously shown, however, the weight of authority holds that these are two separate issues, and the Company can hardly be charged with knowledge, before the fact, that the Court of Appeals was going to adopt its own particular type of bootstrap reasoning.

There is no question that the award of attorney's fees in this case is punitive and contrary to the holdings of this Court. The question is whether it is equitable and justified. Based upon this Court's decision in *Hall* v. *Cole*, the answer clearly is in the negative.

CONCLUSION

For the foregoing reasons, it is urged that this petition for a writ of certiorari be granted.

Respectfully submitted,

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July 6, 1973